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Nos. 93-1372 and 93-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
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SYLVIA EVANS, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

BERTHA BALARK, *et al.*,
Petitioners,
v.
CITY OF CHICAGO,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court should continue to enforce a consent decree controlling the budget of a unit of local government where a change in law since entry of the consent decree makes plain that there is no substantial claim that the decree serves any federal interest.

2. Whether the court of appeals erred by determining that its own prior decision in this case, repudiating a still earlier decision of the same court, had so changed the law that continued enforcement of a consent decree based on the repudiated decision was inequitable or an improper exercise of federal power.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit sitting en banc, Pet. App. 1-23, is reported at 10 F.3d 474. The opinion of the three-judge panel of that court, vacated by the order granting respondent's suggestion for rehearing en banc, Pet. App. 24-50, is reported at 995 F.2d 1393. Prior opinions of the court of appeals in this litigation are reported at 689 F.2d 1286 (7th Cir. 1982), and 873 F.2d 1007 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990).

STATEMENT

This is the second time petitioners have sought certiorari in this litigation, which is now about seventeen years old. The named petitioners are class representatives of two of three consolidated class action lawsuits filed between 1977 and 1979 against the City of Chicago. All three complaints alleged that the City's practice of paying small tort judgments before large ones regardless of the dates on which the judgments were entered, and the City's practice of delaying payment of large tort judgments (although all judgments, when paid, included statutory post-judgment interest) violated the Due Process and Equal Protection Clauses. When certified, the *Evans* and *Balark* classes differentiated on the basis of how old the unpaid judgment was; the reason for any such distinction has long since disappeared. The third class was not involved in the proceedings at issue in these petitions.

On January 28, 1981, the district court entered partial summary judgment in favor of the *Evans* and *Balark* plaintiff classes and against the defendant City of Chicago. The court directed the City to pay all members of the *Evans* class immediately; declared unconstitutional two Illinois statutes governing payment of judgments against municipalities; and certified the order for immediate appeal under Fed. R. Civ. P. 54(b).

The court of appeals affirmed on the basis that the Equal Protection Clause forbade the City to distinguish between large and small tort judgments in setting a payment schedule. See *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) (*Evans I*). The court held that plaintiffs had a protectable property interest in prompt payment (*id.* at 1296), but nonetheless vacated the district court's order on the constitutionality of the state statute, holding that no one had standing to challenge the statute because the City had never chosen to pay anyone under it. *Id.* at 1299. The case returned to the district court for further proceedings.

The parties, with the district court's assistance, entered into negotiations, and on May 30, 1984, the district court approved a consent decree. Pet. App. 93-107. The consent decree recited the course of the litigation and bound the City to pay all judgments in the order in which they were entered and to pay all judgments within 45 days. The consent decree did not settle the question what damages were due for the City's past practices.

Trial proceeded in the district court on the outstanding damages issue. At this stage, petitioners introduced a new theory of equal protection liability. They argued that the City irrationally chose to delay payment of tort judgments while paying other types of judgments (such as contract claims) immediately. See *Evans v. City of Chicago*, 873 F.2d 1007, 1012-13 (7th Cir. 1989) (*Evans II*), cert. denied, 495 U.S. 956 (1990). Petitioners also reasserted their due process argument. The district court held for petitioners on the new equal protection claim and did not address the due process claim.

This time, the court of appeals reversed and overruled the decision in *Evans I*, holding instead that the Equal Protection Clause did not forbid the City from treating tort judgments differently from other judgments, nor from paying judgments slowly. See *Evans II*, 873 F.2d at 1016-18. The court concluded that there was a rational basis for the City to pay small judgments out of order, namely, reducing delays for large numbers of small judgment creditors. *Id.* at 1016. Because petitioners had not pressed their due process claim as an alternate ground for affirmance in *Evans II*, the court of appeals indicated that "[t]he due process claim ha[d] not survived to this stage of the litigation." *Id.* at 1018 n.15; see *id.* at 1012 n.11.

The case returned to the district court, where petitioners' motions for attorneys' fees were pending. Petitioners argued that, despite their defeat in *Evans II*, they were still prevailing parties because they had obtained the consent decree, which remained in effect. The City thereupon

moved to vacate the consent decree under Fed. R. Civ. P. 60(b)(5). The district court granted that motion and denied the petitions for attorney's fees. See Pet. App. 136-38.

Petitioners' motion for reconsideration was granted in part. The district court refused to vacate the consent decree but modified it slightly and vacated the order denying attorney's fees. Pet. App. 140-41. The consent decree, in its modified form, still required the City to pay judgments in the order that they are entered (Pet. App. 101, § IV, ¶ 5); annually to submit to the City Council a request for appropriation of monies sufficient to cover the full anticipated liability for the ensuing year, which may not be less than the total amount of judgments that became final in the preceding year (Pet. App. 102, § IV, ¶ 9); and to follow specified detailed procedures for authorization and payment of judgments (Pet. App. 103, § IV, ¶¶ 10-14). The City was also required to pay judgments within 45 days after the presentment of proper documentation. Pet. App. 103, § IV, ¶ 11(d). The only change the district court made in light of *Evans II* was to add a clause to the decree providing that judgments under $1000 need not be paid in any particular order. Pet. App. 140.

On the City's appeal, a divided panel of the court of appeals affirmed. Pet. App. 24-50. This decision was vacated when the case was set for rehearing en banc. Pet. App. 133. The en banc court of appeals then reversed. Pet. App. 1-23 (*Evans III*). A five-judge plurality held that the consent decree must be vacated because no federal interest remained after *Evans II* for the decree to protect. Pet. App. 1-17. Judge Ripple concurred in the judgment, writing simply that *Evans II* had so changed the prevailing law that continued enforcement of the decree was improper under *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992). Pet. App. 17-18. Judge Cudahy, joined by

Judges Cummings and Rovner, dissented, arguing that a sufficient federal interest remained in enforcing the Constitution, especially the colorable due process claim, against the City's payment practices. Pet. App. 18-22. Judge Flaum, joined by Judge Kanne, also dissented, arguing that, in light of a colorable due process claim, there was no legal or factual change in circumstances that justified setting aside the consent decree. Pet. App. 22.

ARGUMENT

THIS CASE PRESENTS ONLY QUESTIONS OF THE APPLICATION OF WELL-SETTLED LAW WITHIN A UNIQUE FACTUAL CONTEXT.

A majority of the court of appeals in this case resolved two propositions, neither of which merits this Court's attention. The first is that a federal court should not exercise its equitable powers to enjoin operations of local government unless there is a substantial claim of a federally recognized wrong to be remedied. The second is that *Evans II* so changed the law that any claim of a federally cognizable injury in this case was illusory. Neither proposition is the subject of a split of authority in the courts of appeals. Petitioners do not even claim such a conflict. Neither presents an issue of great importance that this Court has not previously addressed. Indeed, this Court in *Rufo* only recently addressed the standard for amending or vacating a consent decree under Fed. R. Civ. P. 60(b)(5). Both propositions are well supported by this Court's precedents and involve application of well-settled rules of law to the unique—indeed almost bizarre—procedural history of this case. Thus the holding below was simply that, in the context of the extraordinary litigation in this case, Rule 60(b)(5) mandated vacatur of a consent decree entered nearly ten years ago. This decision does not warrant plenary review.

1. Petitioners do not appear to argue that a federal consent decree could be entered in the first instance with-

out a showing that some nontrivial federal interest exists. Nor do they argue directly that a federal decree should continue in force after the claimed federal interest is shown to be without substance. Yet that is exactly the result of what they advocate. If a consent decree is treated solely as a contract, as petitioners implicitly submit, then "a deal is a deal." Pet. App. 18 (Cudahy, J., dissenting). But if a consent decree is recognized as an ongoing judicial act, it should not outlive the law it is meant to enforce.

Petitioners rely on the contractual aspects of consent decrees to argue that it is improper to allow reconsideration of the legal basis for a consent decree once the decree has been entered. Evans Pet. 12-17; Balark Pet. 22-26. But this line of argument runs into direct conflict with the decisions of this Court holding that consent decrees are not simply contracts; they are also equitable decrees of a federal court and should not be enforced simply because the defendant has previously consented. See *Local No. 93, Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) (A "federal court is more than a 'recorder' of contracts' from whom parties can purchase injunctions."); *System Federation No. 91, Railway Employes' Department v. Wright*, 364 U.S. 642, 651 (1961) ("The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction."); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) ("We reject the argument . . . that a decree entered upon consent is to be treated as a contract and not as a judicial act."). See also *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846-47 (5th Cir. 1993), cert. denied, 114 S. Ct. 878 (1994).

Indeed, the court reaffirmed this understanding in the case on which petitioners primarily rely, *Rufo v. Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992). The defendants there had agreed to a decree forbidding double celling at the jail prior to the decision in *Bell v. Wolfish*,

441 U.S. 520 (1979), which held that the Constitution does not forbid double celling. Relying on *System Federation*, the Court observed that an intervening change in law is a sufficient ground for relief from a decree despite the defendants' prior consent. See 112 S. Ct. at 762-63. The court concluded that if the defendants "could establish on remand that the parties to the consent decree believed that single celling of pretrial detainees was mandated by the Constitution, this misunderstanding of the law could form a basis for modification." *Id.* at 763. Thus a defendant's prior consent does not immunize a decree from review as the law subsequently evolves.

Decrees, whether entered by consent or otherwise, are still judicial acts. See *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) (" '[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree.") (quoting *System Federation*, 364 U.S. at 651); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976) (referring to the well-established rule that federal "judicial powers may be exercised only on the basis of a constitutional violation" (citation omitted)). Thus, without some violation of federal law to remedy, there can be no exercise of federal judicial power, even if all parties consent. Even Judge Cudahy, in his dissent below, recognized that "[w]hile the Supreme Court has yet to vacate a consent decree on the grounds that there is an insufficient federal interest, it has suggested that the Constitution implictly imposes such a limitation on the equitable powers of the federal courts." Pet. App. 20. Thus, the contractual consent of the parties does not confer on a federal court the power to supervise state and local governments even when unnecessary to safeguard federal rights.[1]

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[1] The plurality below also notes that entry into litigation cannot give the parties greater powers than they otherwise enjoy. That is, the existence of a lawsuit against a municipality cannot give the municipality's chief executive more power than he or she otherwise

Moreover, even if there were some shred of a federal interest left to protect after the governing law changed in *Evans II*, the decision below would still be proper under Fed. R. Civ. P. 60(b)(5) as interpreted by this Court in *Rufo*. See Pet. App. 17-18 (*Evans III*, Ripple, J., concurring). Petitioners do not argue that *Evans II* did not require some change in the consent decree at issue here.[2] As the court of appeals concluded, absent the later discredited decision in *Evans I*, the City would have agreed to no aspect of the consent decree. See Pet. App. 6-7. Plainly this is correct; prior to *Evans I* the City had refused to settle and had defended on the merits. And relief under Rule 60 must "resolve the problems created by the change in circumstances." *Rufo*, 112 S. Ct. at

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had to make City policy. See Pet. App. 7-8. Although Balark attempts to exploit this dictum (Pet. 22-24), the outcome of this case is not dependent on the change in administrations between the time the consent decree was entered and the time it was vacated. Thus, the decision below does not rest on the proposition that one mayoral administration cannot bind later administrations to the terms of a consent decree. Given the change in the law underlying the consent decree, even the administration that entered the decree, were it still in power, would have been entitled to relief under Fed. R. Civ. P. 60(b)(5).

[2] Petitioners argue only that the court below erred by not "tailoring" the consent decree to conform to the change in the law. Evans Pet. 23-25; Balark Pet. 18-20. This argument misses the point. The change in the law eliminated the purpose for any decree with any terms whatever. There is now no basis for any exercise of federal power in this case. With the vacatur, the decree perfectly reflects this change in the law.

Evans further faults the Seventh Circuit for not requiring the City to show extreme and unexpected hardship before vacating the decree. Pet. 17-19. This argument is simply inapplicable to vacatur for a change in the law; it properly applies only to change in facts. *Rufo* rejected the argument that Rule 60 requires a showing that a consent decree works a "grievous wrong" before relief from it is appropriate. See 112 S. Ct. at 757-60. In this case the law has changed so greatly that there is no law for this decree to enforce. There is thus no need to require a showing of hardship from continued enforcement of a decree that ought not to be enforced at all.

764. *Evans II*, as interpreted in *Evans II* by the court that had rendered that decision, eliminated any claim that there is any federal role whatever in oversight of the speed with which units of local government satisfy their judgments.[3] In light of that change in the law, the standards of Fed. R. Civ. P. 60(b)(5) and *Rufo* make plain that vacatur was correct. Indeed, when the district court tried to modify the decree to reflect the falling away of the equal protection claim, the court could not do so. The court had to add an entirely new provision that nothing forbade the City to give small judgments preferential treatment. Even that modification had no practical significance. The decree still required the City to pay all judgments in order and within 45 days. As the court below held, *Evans I* had a greater impact than merely forbidding any quicker payment of small judgments. Thus

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[3] Balark argues (Pet. 15-16, 21) that, in interpreting its own decision in *Evans II*, the court below violated 28 U.S.C. § 2106. This issue is both waived and uncertworthy. The Section 2106 issue is raised for the first time in the petition for certiorari, and Balark has shown no reason for her failure to raise it in the Seventh Circuit. It was entirely evident from the City's opening brief to that court that we were arguing that *Evans II* had affected both the due process and equal protection claim. Yet Balark's brief never cited Section 2106. Moreover, this is not an issue on which the lower courts have split or upon which this Court's guidance is required. Balark does not contend that the federal courts cannot tell dictum from holding.

Balark's position in any event is meritless. While no due process claim was before the court in *Evans II*, that decision's reasoning applied as powerfully to petitioners' due process theories as to their equal protection theories. And the only reason *Evans II* did not directly consider due process was that petitioners did not advance it as an alternative ground for affirmance of their judgment. Moreover, Balark's position that the *Evans III* court could not consider whether petitioners due process theories had enough merit to support the decree leads to an unacceptable result. If Balark is right that consent decree obligors cannot later litigate the legal theories on which a consent decree is based, obligors will have absolutely no opportunity to seek relief from a decree on the basis of a change in the law. Yet such relief is clearly authorized by Fed. R. Civ. P. 60(b)(5).

the repudiation of *Evans I* in *Evans II* required broader relief.

Rufo also teaches that in assessing the propriety of relief under Rule 60, a court should consider the public interest in restoring control over local government to the people's elected representatives. Accord *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991). Thus if the court below correctly concluded that petitioners' due process theory lacked substance (and neither petition quarrels with that conclusion), there is no justification for preserving a federal district court's control over municipal taxing and spending in order to protect these nonexistent due process rights.[4]

Thus, there appears to be no disagreement—by the dissenters or petitioners—about the governing legal principles here. The only issue is whether those principles were correctly applied to the unique facts of this case. Thus, the point separating the plurality and the concurrence from the two dissents is whether, on these facts, the unlitigated due process claim was colorable enough and enough of a basis for the consent decree to support that decree after the equal protection claim was so roundly denounced. But neither petition even argues that the due

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[4] There is in fact no merit to the due process claim. Considered as a substantive due process claim, the contention that delays in paying judgments are unconstitutional because time erodes their value is no different from a claim that a post-judgment interest statute providing for a below-market rate is unconstitutional. As the court below correctly noted, such a claim is frivolous. See Pet. App. 14-16. Likely for this reason, petitioners, as well as the *Evans I* court and the dissenters below, characterized the claim as a procedural one. But the claim is no stronger that way. The decision to delay payment for budgetary reasons was made legislatively—when the Chicago City Council appropriated funds to pay judgments in its annual appropriation ordinance. Decisions since *Evans I* make clear that such legislative action satisfies due process when across-the-board determinations governing many cases must be made. See *Atkins v. Parker*, 472 U.S. 115, 129-31 (1985); *United States v. Locke*, 471 U.S. 84, 108 (1985).

process claim has merit. And although much of Evans' petition is devoted to complaining about how the lower federal courts have interpreted this Court's decision in *Rufo* (see Pet. 8-11), the petition fails to show how this case represents a misapplication of *Rufo*.[5] Indeed, the petition fails to show that any of the cited cases has misapplied *Rufo*. See Pet. 10. It seems that Evans' real complaint is not with the interpretation given *Rufo* by the Seventh Circuit or other courts, but with *Rufo* itself. See Pet. 10-11, 13-15.

Petitioners raise the specter that hundreds of consent decree obligors will rush to the courthouse seeking to vacate decrees because the Seventh Circuit's opinion in this case makes it seem so easy. Evans Pet. 8-11; Balark Pet. 26-27. Even a cursory look at this opinion and the litigation leading up to it shows how ludicrous this suggestion is. The City litigated the merits of petitioners' constitutional claims to the Seventh Circuit and lost in *Evans I*. The district judge then applied heavy pressure to the City to enter a decree based on what "the Court of Appeals ordered done a long time ago." Pet. App. 6 (quoting district court). Almost five years later, the Seventh Circuit reversed itself in *Evans II*. But even after that, the district court refused to vacate the consent

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[5] Evans misrepresents the proceedings in the district court in an effort to show that this case misapplied *Rufo*. The petition notes the evidentiary hearings at which the district court took testimony about what motivated the City to enter the consent decree. See Pet. 15. The district court itself, however, later agreed that all this evidence was irrelevant because the interpretation of the consent decree should be based, just as petitioners urge (Pet. 14, 16) on its four corners. See Pet. App. 61-62. No judge at any time in this litigation has ultimately held that subjective motivation is relevant under Fed. R. Civ. P. 60(b)(5). This point disposes as well of Evans' claim that the Seventh Circuit found facts. Pet. 27-30. Evans claims that the plurality determined the motivation of the City for entering the decree. But that court made no inquiry at all into what was in the minds of City officials in entering the decree. The only inquiry was into the state of the law and the posture of the case at the time of the decree.

decree, and the City lost its appeal before the panel. Only after obtaining rehearing en banc did the City prevail, and then only by the fewest possible number of judges in two separate opinions. Thus all the court below has held is that an outright repudiation by the court of appeals of the very decision that forced settlement in the first place is a sufficient basis to vacate a decree. Surely such a limited holding will cause no stampede to the courthouse. And, in any event, those consent decrees that are based on bygone legal theories should be modified or vacated. Federal Rule of Civil Procedure 60(b)(5) and *Rufo* provide for just that.

In this respect, the decision below is perfectly in accord with *System Federation,* which neither of the petitions in this case even mentions, although it was a centerpiece of the plurality's opinion. See Pet. App. 7, 9. In *System Federation,* a consent decree was entered that forbade the Railroad from discriminating against employees who refused to join a union. See 346 U.S. at 644. After the consent decree had been in place for several years, federal law was changed to allow a union shop. *Ibid.* This subsequent legal change could not, of course, affect the legal basis of the consent decree at the time the decree was entered. Had the decree been nothing more than a binding agreement based on the exchange of consideration, there would have been no basis for reforming the decree after Congress changed the law. As the lower courts in that case noted, there was nothing under the new law that prohibited the measures dictated by the consent decree. See *id.* at 646. Nonetheless, this Court held that the change in the law was sufficient to require modification of the decree. As this Court recognized as recently as *Rufo,* the reasoning of *System Federation* still holds: if federal law has changed, then the federal courts ought not to continue to exert their power to protect federal interests that no longer exist. The court below faithfully implemented this rule in this case. The plurality and the concurring judge determined that the decree was entirely based on *Evans II* and therefore had to be vacated.

This narrow, fact-bound, correct decision does not merit review.

2. The real issue in this case is whether litigants who ultimately lose on all questions of law may nonetheless keep the benefits of a consent decree entered on the basis of an interlocutory victory. For there is no other basis on which petitioners could possibly hope to keep the consent decree in place. Not a single judge who has heard this case in *Evans II* or since then has been willing to hold that any clause of the Fourteenth Amendment actually requires that units of local government satisfy judgments against them within any particular time frame. Even the dissenters below would go no further than describing the due process claim as "at least colorable." Pet. App. 21 (Cudahy, J., dissenting); see Pet. App. 22 ("a colorable due process theory supported at least part of this decree when it was entered") (Flaum, J., dissenting).[6] And petitioners, although decrying the loss of the consent decree (and thus their attorney's fees), nowhere argue that the City's payment practices ever violated the Constitution or that there is any risk that the City would return to its prior practices unless restrained by the consent decree.

These gaps in petitioners' argument leave a consent decree that simply could not have been agreed to by the parties had it been proposed after *Evans II* and that could not have been entered by the district court even if

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[6] Balark complains that the Seventh Circuit has created a new test for determining whether a consent decree is supportable: whether there is a "substantial" federal interest,, rather than whether there is a "colorable" claim. But Balark herself admits that the precise standard under the decision below is "undefined." Pet. 25. There is no indication in the opinions below that this is anything more than semantics. It is more than evident from the plurality opinion that there was no semblance of a federal issue in the aftermath of *Evans II*. This Court need not use its resources to decide whether "substantial" means more than "colorable" in a case in which the difference if any is plainly irrelevant to the outcome of the case.

the parties had agreed. See *League of United Latin American Citizens v. Clements*, 999 F.2d at 845-46. The issue here is whether that unadjudicated theory can support this consent decree when it is a certainty that they would not prevail on the merits.[7] The court below acted properly and in harmony with the decisions of this Court in vacating the decree that required an ongoing exertion of federal power in support of a theory that simply is not the law. That decision does not conflict with the decision of any other circuit or with any decision of this Court. Nor could it. We are aware of no other case in which the change in the law relied on for application of Fed. R. Civ. P. 60(b)(5) was a reversal of an interlocutory decision by the same court in the same litigation. This chain of events is unlikely ever to recur. Thus, further review in this case would prove of little help to the lower courts in their consideration of other cases.

At the heart of this case is the assessment of the effect of *Evans II* on this case. The Seventh Circuit is in far

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[7] Evans' argument about pendent jurisdiction (Pet. 20-23) fails for two reasons. First, it is waived: the state law claims were not raised as grounds for relief separate from the constitutional claims in the complaint. See Pet. App. 96, ¶ 2; Pet. App. 98, ¶ 9. Rather, the state law issues were raised only to show the existence of a federally protected property interest. Second, there can be no pendent jurisdiction where the federal claims are insubstantial. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Here, the court below correctly held that the federal claims are not even colorable, and petitioners do not even argue that they would prevail on any federal claim if the issues were to go to trial today. Thus, if this case were brought today, any pendent state law claim would be dismissed.

In any event, if Evans wants a ruling on her state law claims, she is not precluded by the Seventh Circuit's judgment from asking the district court for one. All that court held is that the consent decree must be vacated. It does not in terms terminate this litigation, although dictum in the plurality opinion certainly indicates a hope that that will be the result. Of course, that state law claim is by definition not certworthy.

the best position to determine, as it did in the decision below, what it meant by its opinion in that case and how far it meant to go in overturning its decision in *Evans I*. This Court was asked to review *Evans II*, but declined, 495 U.S. 956, and for good reason. This Court's redetermination of the issues in that case would have been of extremely limited utility to other courts. Nothing more is at stake here. All that the court below decided was what the court meant by its own opinion in *Evans II*, and it then applied settled law to the case as so viewed. This Court need not give guidance to other circuits on that issue.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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